



# The Attorney General of Texas

March 9, 1983

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An Equal Opportunity/  
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Honorable Mike Driscoll  
Harris County Attorney  
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Open Records Decision No. 361

Re: Availability of certain  
information from pre-employment  
application file to unsuccessful  
applicant

Dear Mr. Driscoll:

The Harris County Sheriff's Department has received a request under the Open Records Act for information relating to an unsuccessful applicant for employment. You state that after beginning the background investigation of the applicant, the sheriff's department uncovered some unfavorable information about him and rejected him for employment. The information he seeks is a statement of the reasons for the rejection of the individual's application, and the request is made on his behalf by his attorney. You have construed this request to cover a handwritten statement prepared by a personnel department investigator dated September 27, 1982.

You suggest that sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(8), and 3(a)(11) except the material in question from disclosure under the Open Records Act.

Section 3(a)(1) excepts from public disclosure:

information deemed confidential by law, either  
Constitutional, statutory, or by judicial  
decision.

We are aware of no statute which makes this information confidential. Information excepted from disclosure by a constitutional right of privacy exists only in one of the protected "zones of privacy" delineated by the United States Supreme Court, that is, matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. See Open Records Decision No. 260 (1980). The materials submitted do not relate to any subject within a protected zone of privacy.

The judicially created doctrine of "common law privacy" protects information containing:

highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and... not [be] of legitimate concern to the public.

Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 685 (Tex. 1976); Open Records Decision No. 260 (1980). In our opinion, the records in question do not consist of such highly intimate or embarrassing facts.

Section 3(a)(2) protects "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." An applicant's file is a personnel file. Open Records Decision No. 223 (1979). This exception prevents the disclosure of intimate details of a highly personal nature. Open Records Decision Nos. 284 (1981); 168 (1977). The records in question do not include any information protected by this standard. See Open Records Decision No. 316 (1982).

Section 3(a)(3) protects:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party... that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

This exception applies when litigation is pending or reasonably anticipated. Open Records Decisions Nos. 289 (1981); 139 (1976). The mere chance of litigation is not sufficient to warrant withholding of information. Open Records Decisions Nos. 183 (1978); 139 (1976). In the present case, the request for records was made on the applicant's behalf by an attorney. You have presented no other facts, for example, statements of intent to sue, suggesting that litigation might result. We do not believe that the single fact that the request was made by an attorney on behalf of a rejected applicant is sufficient to invoke the litigation exception. Compare Open Records Decision No. 288 (1981).

Section 3(a)(8) applies to:

the internal records and notations of... law enforcement agencies which are maintained for internal use in matters relating to law enforcement.

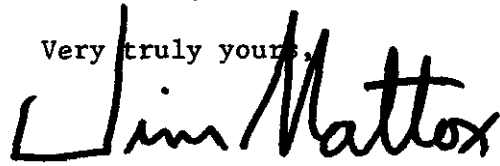
You state that the background information requested reveals any problems a person might have in fulfilling his employment responsibilities. You suggest that informants would be unwilling to provide such information if it were to be disclosed. Section 3(a)(8) prevents disclosure of information where disclosure would "unduly interfere with law enforcement." Open Records Decision No. 216 (1978). The difficulties you raise do not appear to present an undue interference with law enforcement. The information sought concerns someone who, you state, was never a Harris County employee. This office has held that information relating to complaints against peace officers and disciplinary actions resulting therefrom constitutes public information, not excepted by section 3(a)(8) of the Open Records Act. Open Records Decision Nos. 329 (1982); 208 (1978). The name of the complainant specifically is not excepted from disclosure by section 3(a)(8). Open Records Decision No. 208 (1978). The disclosure of complaints and derogatory information concerning peace officers thus has been determined to be subject to release. The disclosure of similar information about mere applicants would, we believe, be even less likely to injure the interests protected by section 3(a)(8). See also Open Records Decision No. 287 (1981).

You finally argue that section 3(a)(11) prevents disclosure of this record. Section 3(a)(11) applies to:

inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency.

The record consists of a note written by a member of the personnel division of the sheriff's department to another employee of the division; thus, it fits within the general category of documents protected by 3(a)(11). However, this exception protects only opinion, advice, and recommendations. Open Records Decision No. 334 (1982). Factual matters which are severable from expressions of opinion may be disclosed. We have marked the portion of the memo which contains opinion, advice, or recommendations. This portion may be withheld. The remainder must be disclosed to the requesting party.

Very truly yours,

  
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